

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

AIR SERV CORPORATION¹
Employer

and

Case 26-RC-8548

**TEAMSTERS LOCAL UNION NO. 984,
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS²**
Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, Air Serv Corporation, provides airport related services to various airline carriers throughout the United States. The Petitioner, Teamsters Local Union No. 984, affiliated with the International Brotherhood of Teamsters, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to represent the Employer's drivers who perform shuttle transportation services for Federal Express Corporation ("FedEx") in Memphis, Tennessee. Following a hearing before a hearing officer of the Board, the parties filed briefs with me.

The issues raised at the hearing are: (1) whether the Employer is subject to the jurisdiction of the National Labor Relations Act (the "Act") or the Railway Labor Act ("RLA"); and (2) whether the Employer's bus groomers possess such a close community of interest with the drivers as to require their inclusion in the unit. The Petitioner contends that the Employer is subject to the jurisdiction of the Act and that the

¹ The Employer's name appears as amended at the hearing.

Employer's 2 bus groomers do not share a community of interest with the approximately 180 petitioned-for drivers. Contrary to the Petitioner, the Employer asserts that it is subject to the jurisdiction of the RLA and that the bus groomers should be included in the unit. There is no history of collective bargaining for any of the employees in issue here.

I have considered the evidence presented at the hearing and the arguments advanced by the parties. As discussed below, I have applied the two-part test established by the National Mediation Board (NMB) for determining whether an employer is subject to the jurisdiction of the RLA and concluded that the Employer is subject to the jurisdiction of the RLA, rather than the Act because (1) the work it performs for FedEx is work traditionally performed by airline employees; and (2) FedEx exercises substantial control over the Employer. Because the Employer is not subject to the jurisdiction of the Act, I am dismissing the petition and find it unnecessary to decide whether the groomers should be included in the unit.

To provide a context for my decision, I will first present an overview of the Employer's operations. Next, I will set forth the legal principles controlling the jurisdiction issue and the relevant facts that apply to that standard. I will then set forth the reasoning for my conclusion that the Employer is not subject to the jurisdiction of the Act.

I. OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer has its corporate headquarters in Atlanta, Georgia and provides airport-related services in 27 cities in the United States. Those services include shuttle

² The Petitioner's name appears as amended at the hearing.

bus services, ticket counter operations, skycaps, baggage handlers, and wheelchair attendants. Pursuant to an agreement with FedEx that became effective in about July 2003, the Employer provides shuttle transportation services for FedEx in Memphis, Tennessee. In providing these services, the Employer employs 180 bus drivers, 2 bus groomers, 3 mechanics, 7 team leaders, and 6 managers. The Employer also provides baggage handlers, wheelchair attendants, and ticket checkers to Northwest Airlines in Memphis but those employees are not in issue here.

The Employer's chief operating officer is Dave Feldman. One of the individuals reporting to Feldman is Senior Vice President Edwin Smith, who is responsible for overseeing the day-to-day operations in Memphis and four other cities. Reporting to Smith is Mike McGee, the general manager at the Memphis FedEx operations. Reporting to McGee are Dayside Operations Manager Sara Bell and Nightside Operations Manager Wayne Hollie, Office Manager/Human Resources Manager Priscilla Diamonte, Maintenance Manager Chris Lawrence, and Safety Manager Tom Bush.

II. JURISDICTION ISSUE

A. CONTROLLING LEGAL PRINCIPLES

Section 2(2) of the Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. Sec. 152(2). Similarly, Section 2(3) of the Act provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. Sec. 152(2). The RLA, as amended, applies to rail carriers and to:

Every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service. [45 U.S.C. Sec. 151 First and 181.]

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NMB applies a two-part test in determining whether the employer and its employees are subject to the RLA. *Air Serv Corporation*, 33 NMB 272 (2006) (finding RLA jurisdiction over the Employer's operations at the San Francisco airport); *AircraftServ. Int'l Group, Inc.*, 33 NMB 200 (2006). First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers -- the "function" test. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers -- the "control" test. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Id.*

To determine whether there is carrier control over a company, the NMB looks to several factors including: the extent of the carrier's control over the manner in which the company conducts its business; access to company's operations and records; role in personnel decisions; degree of supervision of the company's employees; whether employees are held out to the public as carrier employees; and control over employee training. *Air Serv Corporation*, *supra*; *Empire Aero Center, Inc.*, 33 NMB 3 (2005); *Signature Flight Support*, 32 NMB 214 (2005); *Signature Flight Support/Aircraft Serv. Int'l, Inc.*, 32 NMB 30 (2004).

In determining whether an employer and its employees are subject to the jurisdiction of the RLA or the NLRA, the Board has adopted the NMB's application of a two-pronged test. *Chelsea Catering Corporation*, 309 NLRB 822 (1992); *Globe Aviation Services*, 334 NLRB 278 (2001).

B. FACTS

1. Nature of Work Performed

The Employer provides shuttle bus transportation services for FedEx employees between FedEx parking areas and designated points at FedEx's Memphis Hub Complex. The Employer's drivers take the FedEx pilots to and from the aircraft and take other employees to and from the Hub where they sort packages and load and unload the aircraft. The shuttle bus services originally were performed exclusively by FedEx employees and then were performed by another contractor. Currently, the work is performed both by the Employer and by FedEx. The record is not clear about the extent to which FedEx employees perform shuttle bus services. An employee witness testified that there were eight FedEx drivers who perform shuttle bus services. It appears they only transport pilots to the planes and are not involved in transportation from the parking lot.

2. FedEx's Control Over the Employer's Business

a. Facilities

The Employer conducts its FedEx operations from space provided by FedEx in FedEx's Bus Service Center ("BSC") and FedEx's Air Operations Center ("AOC"). The BSC is located on the north side of Democrat Road³ in a parking lot on FedEx's

³ I take administrative notice that Democrat Road abuts Memphis International Airport.

property. The Employer's dayside operations manager, nightside operations manager, safety manager, and team leaders work out of an office at the BSC. The BSC has a breakroom that the Employer shares with FedEx employees. The AOC is located on the south side of Democrat Road. It contains a break area referred to as a "refreshment center" with a vending machine controlled by FedEx. The Employer's employees share the refreshment center with FedEx pilots. FedEx does not charge the Employer rent for using the BSC and AOC. FedEx also provides telephone equipment, internet service, electricity, cleaning and office security at these facilities free of charge. The BSC and the AOC are cleaned daily by a FedEx facilities maintenance group and office security at these facilities is provided by FedEx security officers. FedEx also provides parking for the Employer's employees who park their personal vehicles in the FedEx parking lots alongside FedEx employees.

To gain access to certain areas of FedEx's property, drivers must present their FedEx issued identification badges and pass through a FedEx security checkpoint, where their belongings are searched by FedEx security. FedEx has the right to search the Employer's drivers, vehicles and belongings at any time, and can deny drivers access to the property if a driver fails to present the proper identification badge. Drivers are required to clock in daily at the facility where they are assigned to work and do so by placing their hand on a machine maintained by the Employer. The data from the machine is transferred into the Employer's payroll system.

b. Equipment

FedEx determines the number and type of buses the Employer will provide and must approve any changes in the quantity or style of the buses. The buses are white

and have an orange and purple FedEx logo on the side. The Employer's name and logo are not on any of the buses. The Employer uses two styles of buses: a cutaway style bus that seats 17 or 25 passengers and a larger bus that accommodates 38 passengers. The fuel for the buses is supplied by FedEx, at FedEx's expense, and is pumped at a facility on FedEx's property referred to as the "fuel farm." FedEx has set a mileage limit of 250,000 miles that the buses must not exceed. The Employer is prohibited from using the buses for any other customer. Upon termination of the agreement with the Employer, the buses and all maintenance records for the buses become the property of FedEx.

The buses are equipped with two-way radios that allow drivers to communicate with the dispatchers. The contract specifies that these radios are to be purchased and maintained by the Employer at the Employer's expense. The buses also have a global positioning system that is linked to computers in the BSC and AOC. The global positioning system allows FedEx to monitor and track the location of buses and measure the Employer's compliance with the work schedules and maximum waiting periods for pickups established by FedEx. FedEx supplies the Employer's drivers with remotes and proxy cards that are programmed by FedEx and allow drivers to open gates and access secure areas of the facility.

c. Performance Standards

FedEx requires the Employer to comply with established performance standards that are set forth in the service agreement. For example, the Employer is responsible for maintaining and cleaning the buses, maintaining insurance for the buses, and ensuring that no FedEx employee waits more than 10 minutes for a bus. The Employer

is required to submit quarterly and annual reports to FedEx regarding its compliance with the performance standards. The contract grants FedEx the right to fine the Employer for failing to meet FedEx's standards such as the bus cleanliness standards, for having an insufficient number of buses, or for failing to maintain an accurate account of the hours worked, comply with FedEx security and safety rules, adequately maintain the buses, or provide accurate and timely maintenance records. The Employer has received such fines.

FedEx requires the Employer's drivers to comply with certain appearance standards, including a requirement to keep their uniforms neat and clean. FedEx can also fine the Employer if a driver fails to meet this standard. Drivers are required to wear a standard uniform furnished by the Employer that consists of a gray and white vertically striped shirt and gray pants. The Employer's logo does not appear on the standard uniform. In addition to the standard uniform, the Employer permits drivers to wear white caps with or without the Employer's logo and uniform shirts that have the Employer's logo. Along with the standard uniform, drivers are also required to wear a photo identification badge that is issued by FedEx. FedEx's name appears in a hologram on that badge.

d. Timing and Location of Services

Although the Employer assigns drivers to one of three shifts, FedEx determines the hours of the shifts and the number of hours of daily service the Employer provides. FedEx adjusts the hours of the shifts on holidays and days when there is inclement weather. The Employer can only change shift hours with FedEx's permission.

FedEx also determines the drivers' routes and the number of drivers on each route. During December, FedEx's peak season, FedEx frequently has the Employer place additional drivers on the routes. Additionally, if a FedEx shuttle driver is absent from work, FedEx changes the schedule of the Employer's drivers to cover the schedule of the absent FedEx employee. Drivers are dispatched to their routes by FedEx and Employer dispatchers who work side-by-side at the AOC. Two third-shift drivers testified that they are dispatched by a FedEx dispatcher during their shift and a second shift driver testified that she is only dispatched by an Employer dispatcher. FedEx and Employer dispatchers dispatch drivers to the aircraft and gates by using radios that operate on a FedEx frequency. FedEx dispatchers instruct drivers to change their routes when the assigned route is obstructed by construction or a plane. When performing their duties, the Employer's drivers, like the FedEx employees who perform the same work, are required to follow certain rules established by FedEx, including ramp and runway incursion rules, use of property rules, and speed limits.

e. Other Matters

FedEx pays the Employer a fee based on the number of hours the shuttle buses operate per week. However, drivers' hourly wage rates, benefits, and raises are established by the Employer. The Employer uses its payroll system and an outside vendor to process payroll. Paychecks for drivers are generated by the Employer's corporate office in Atlanta and distributed to drivers by the Employer at the Memphis jobsite. Drivers report absences and submit leave requests to the Employer. The Employer has instructed drivers to present all work-related problems to the Employer, not FedEx, since doing so is considered by the Employer to be a conflict of interest.

The agreement between the Employer and FedEx describes the relationship between the Employer and FedEx as an independent contractor relationship. The contract provides in relevant part that: (1) FedEx shall not exercise control over the conduct or supervision of the work the Employer performs or the means of its performance; (2) all matters pertaining to the Employer's employees are the Employer's responsibility; (3) all employment arrangements are the Employer's concern; and (4) the Employer shall exercise exclusive control over its employees and none of the Employer's employees are considered employees of FedEx. The agreement also provides that FedEx can cancel its agreement with the Employer at any time.

3. FedEx's Role in Personnel Decisions

a. Hiring

FedEx is not involved in the hiring process until after an applicant has been through an initial screening by the Employer. Applicants for driver positions with the Employer complete an application provided by the Employer. The Employer's human resources department then reviews the completed applications to determine if the applicant meets the minimum qualifications for shuttle drivers, including one-year's driving experience and possession of a CDL license, a requirement FedEx requires all the Employer's drivers to satisfy. Applicants approved by the Employer's human resources department are then interviewed by the Employer's managers.

Applicants the Employer determines to be a good fit for the Employer and FedEx must take and pass a drug test that is administered by the same vendor FedEx uses to drug test its own employees, and complete two forms FedEx requires the Employer's applicants to complete – a FedEx badge form and a background investigation consent

form. Background checks are performed by Blue Line, a vendor FedEx requires the Employer to use.

The Employer is required to submit the applicant's FedEx badge form, the background consent form, and the background report it receives from Blue Line to FedEx for FedEx's review. FedEx has the authority to approve or reject an applicant based on its review of these materials. If FedEx does not approve an applicant, the Employer will terminate the hiring process. However, if FedEx rejects an applicant based on information contained in the background report, the applicant is given 10 days to resolve the matter with FedEx security. If the applicant is unable to resolve the matter with FedEx, the Employer is required by FedEx to terminate the employee and submit a personnel action form to FedEx showing that this has been done.

If FedEx approves the applicant, the employee is invited to participate in the Employer's three-day orientation session. Employees who are invited to orientation are advised by the Employer that they are conditionally hired pending the results of a fingerprinting process known as SIDA (security identification display area) conducted by FedEx managers at the FedEx facility. FedEx can either approve or reject the employee based on this process. FedEx gives employees who are not approved a period of two weeks to resolve the matter with FedEx security. If the employee is unable to resolve the matter, the Employer is required by FedEx to terminate the employee and submit documentation to FedEx verifying that this has been done. Employees who are approved are issued a SIDA identification badge that allows them to gain unescorted access to FedEx's hub/ramp, a high-security area.

b. Discipline

FedEx can and has made recommendations to the Employer regarding discipline of the Employer's employees. The Employer's witnesses testified that the Employer had never refused FedEx's request to discipline or terminate an employee and described three instances where the Employer followed FedEx's recommended discipline of its drivers. The first instance involved a driver who worked part-time for the Employer and part-time for a vendor of FedEx. FedEx learned that the driver was involved in an altercation with the vendor on airport property. FedEx barred the driver from entering FedEx property for two weeks and ultimately recommended that the Employer terminate the driver. In the second instance, FedEx recommended the immediate termination of a driver who was accused of carrying a weapon and threatening another Employer driver. FedEx security conducted a search of the driver's belongings and discovered a knife. In the third instance, FedEx security asked the Employer to discipline a driver who, while trying to gain access to the facility, falsely reported that his badge had expired. In each of these cases, the Employer followed FedEx's recommendations.

However, the Employer has disciplined drivers without receiving a recommendation from FedEx to do so. A driver testified that he was written up by a dayside operations manager for reporting to work 30 minutes late; that the Employer terminated a driver for attendance infractions; and that another driver was terminated for violating an Employer policy prohibiting drivers from presenting work-related problems to FedEx managers. A third shift driver testified that he received a three-day suspension from the Employer for hitting a guidepost with his shuttle bus.

FedEx has also removed the Employer's drivers from its property and prohibited drivers from working in certain areas of its facility. In late 2007, FedEx removed a driver who entered the property with the smell of alcohol on his breath. FedEx and airport security removed an employee who was involved in an altercation with another employee. FedEx prohibited a driver from driving in the ramp area of the facility after an investigation by FedEx revealed that the employee had a disagreement with a FedEx employee.

When FedEx observes safety rule infractions committed by the Employer's drivers, FedEx will contact the Employer and request that the Employer conduct an investigation and advise FedEx of its findings and the discipline issued. FedEx's corporate safety team, in conjunction with the Employer, investigate driver accidents that occur on FedEx property. The aim of FedEx's investigation is to determine if the accident was the fault of the Employer or a FedEx employee. FedEx requires the Employer to prepare and submit an accident report, conduct remedial training with the driver before the driver is allowed to return to work, and advise FedEx of the discipline it imposed. The Employer is also required to participate in weekly safety review board meetings with FedEx where all accidents and the resulting discipline are discussed.

c. Evaluations and Rewards

The Employer conducts performance evaluations of its drivers. When preparing the evaluations, the Employer considers input from FedEx, including commendations, complaints and work infractions that FedEx brings to the Employer's attention. The Employer considers performance evaluations when determining whether a driver will

receive a pay raise. The Employer also considers FedEx's input when determining whether a driver will receive a reward or recognition.

4. FedEx's Control Over Employee Training

FedEx requires the Employer to ensure that all drivers, including new hires, receive FedEx safety training and follow operating rules established by FedEx. Training is conducted in order to familiarize drivers with FedEx and its standards and rules pertaining to SIDA, bus routes, ramps, and operation of buses. When conducting training, the Employer utilizes Smith System safety training materials provided by FedEx which include ramp and runway incursion videos and DVDs and two PowerPoint presentations. The Employer must submit various documents to FedEx certifying that safety training was provided.

FedEx has also provided training to the Employer's drivers. Within the past year, FedEx's corporate safety officer met with the Employer's drivers and conducted a safety review after a driver breached the safety rules by passing a prohibited item through the fence.

5. FedEx's Access to Employer's Records

FedEx requires the Employer to maintain and make available records regarding maintenance, personnel, bus operations and affirmative action. The Employer is required to complete and submit various records to FedEx including a monthly termination list, new hire paperwork, accident reports, maintenance records and payroll data. The Employer is also required to complete and maintain field sheets that list the Employer's drivers by name, along with their assigned bus number and route assignment.

FedEx has audited several types of these records including field sheets, drug test records, runway incursion records, yearly motor vehicle release records, SIDA records, and global positioning data. FedEx has the authority to audit field sheets at any time. The most recent field sheet audit by FedEx was in the summer of 2007. During that audit, FedEx discovered that the Employer had utilized an insufficient number of drivers on some shifts and fined the Employer for this conduct.

In an effort to meet FedEx's maintenance requirements, the Employer uses a maintenance system to track and keep a daily record of all maintenance repairs, mileage, parts and maintenance schedules. These maintenance records are available to FedEx on a daily basis and have been audited by FedEx on numerous occasions. The Employer's office manager/human resources manager testified that FedEx has general access to the Employer's business records beyond what the Employer provides to FedEx on a regular basis.

C. ANALYSIS

As explained below, I find that the Employer satisfies both prongs of the NMB's two-part test, and is therefore subject to the jurisdiction of the RLA.

1. The Employer's Work is Traditionally Performed by Air Carriers

The Employer provides shuttle transportation services for FedEx which entails transporting FedEx pilots and employees who load and unload FedEx's planes to various points at FedEx's airport facility. The Employer's drivers sometimes substitute for FedEx employees who provide similar shuttle transportation services. The NMB has previously determined that FedEx is an air carrier subject to the jurisdiction of the RLA. *Federal Express Corporation*, 6 NMB 422 (1978); *Federal Express Corp.* 323 NLRB 871

(1997). The NMB has also held that the transportation of airline employees is work that is traditionally performed by air carrier employees. *Milepost Industries*, 27 NMB 362 (2000). Based on this clear precedent, I find that the Employer's drivers perform functions that have been traditionally performed by air carriers.

2. FedEx Exercises Substantial Control Over the Employer

FedEx exercises a significant degree of control over numerous facets of the Employer's FedEx operations. FedEx has the unfettered discretion to cancel its agreement with the Employer at any time. FedEx furnishes the Employer with rent free office space and parking, along with free telephone and internet service. The fuel the Employer uses to transport FedEx employees is provided by FedEx at no cost to the Employer. The Employer's operating hours are determined by a schedule FedEx prepares and requires the Employer to follow.

FedEx determines the number and type of buses the Employer must use to transport FedEx employees, as well as the drivers' routes and the number of drivers needed on each route. FedEx dispatchers dispatch many of the drivers to their routes on a daily basis. FedEx requires that drivers submit to random drug tests and comply with FedEx safety rules and regulations that apply to the operation of their buses. Although the Employer provides its own uniforms to drivers, FedEx requires drivers to follow FedEx's established appearance standards and to wear a FedEx identification badge.

FedEx requires the Employer to follow performance, cleanliness and maintenance standards and to regularly submit reports to FedEx regarding its

compliance with these standards. The parties' agreement grants FedEx the right to fine the Employer if it fails to meet these standards.

FedEx plays a significant role in the Employer's personnel decisions. Although the Employer reviews employment applications and conducts the initial interviews, the Employer is not allowed to hire drivers without FedEx's consent. FedEx has made disciplinary recommendations to the Employer that the Employer followed, including the termination of two drivers. The Employer has never refused a FedEx request to discipline an employee.

FedEx mandates that the Employer provide training to its drivers utilizing FedEx's training material and videos. The Employer is obligated to present documentation to FedEx showing its compliance with FedEx's training requirements. FedEx has directly trained drivers after discovering that safety rules had been breached.

FedEx requires the Employer to maintain various business records. FedEx has general access to all of the Employer's business records, as well as the right to audit those records. In that regard, FedEx audits many types of records the Employer maintains, including personnel records, maintenance records and global positioning system data.

The breath and depth of FedEx's control compels me to conclude that the Employer has satisfied the control prong of the NMB's two-part jurisdictional test. The facts relating to FedEx's control of the Employer are analogous to the facts in *Milepost Industries*, 27 NMB 362 (2000) and *Ogden Ground Services, Inc.*, 30 NMB 404 (2003). In both cases, the NMB found the employers were covered by the RLA.

In *Milepost Industries*, the employer provided airline crew transportation services for four major airlines, including United Airlines. The NMB found that United exercised substantial control over Milepost's operations based on the fact that United, among other things, possessed the power to cancel its service contract at any time and for any reason; could reject drivers that did not meet its standards; required that drivers be drug tested and adhere to appearance standards; required Milepost to transport flight crews at unscheduled times; retained the right to review Milepost's business records; and dictated the type of vehicle Milepost used to pickup flight crews. Each of the facts that the NMB relied on in the *Milepost Industries* case is present here.

In *Ogden Ground Services*, the National Labor Relations Board refused to assert jurisdiction over an employer that provided aviation support services to an air carrier after the NMB determined that the RLA applied to the employer. *Ogden Ground Services*, 339 NLRB 869 (2003). In reaching its decision, the Board found that the air carrier exercised substantial control over the employer's operations based on several facts present here. For example, the Board noted that the air carrier: directed the employer's employees and communicated with them on a daily basis; required the employer to complete and submit certain paperwork, maintain records that comported with the employer's guidelines, and follow operating and training procedures; provided training to the employer's employees and most of the equipment used by the employer's employees; retained the right to make certain disciplinary recommendations; made requests to remove and reassign employees that the employer always followed; and required compliance with personal appearance standards.

In its post-hearing brief, the Petitioner relies on *D&T Limousine Co.*, 207 NLRB 121 (1973) and 320 NLRB 859 (1996) to support its contention that FedEx does not exercise control over the Employer's operations and is not subject to RLA jurisdiction. These cases are distinguishable and do not compel a finding that the Employer is covered by the Act. In the *D&T Limousine* cases, the *D&T* drivers spent a significant amount of their time away from the railroad's property when performing their job duties and *D&T* expected the drivers to follow its own rules and regulations. Conversely, the Employer's drivers perform their work only on FedEx's property and are required to follow numerous FedEx rules and regulations, including those regarding safety, bus operations and appearance. Furthermore, FedEx retains the right to fine the Employer when these rules are not followed, a fact which was not present in the *D&T* cases. Another critical difference between *D&T* and the instant matter involves the ability to access records and control over training. Here, it is undisputed that FedEx has the right to access and audit a variety of the Employer's business records, including employee personnel records, and requires the Employer to train drivers using FedEx training materials. No such evidence was present in the *D&T* cases. Also, in *D&T*, the Board noted that *D&T* exercised substantial control over its operations as evidenced by its ability to make final decisions about whether a job applicant would be hired. Unlike *D&T*, the Employer here lacks the authority to render final decisions about an applicant's employment status. Those decisions are reserved exclusively for FedEx. These stark factual differences convince me that the degree of control FedEx exercises over the Employer is far more substantial than the degree of control the railroad carrier exercised over *D&T*.

Because the facts here regarding degree of control are strikingly similar to the facts in the more recently decided *Milepost Industries* and *Ogden* cases, I find that these cases, not *D&T*, are controlling here. Accordingly, I find that the Employer has satisfied the NMB's jurisdictional test and is subject to the jurisdiction of the RLA.⁴ Therefore, I shall dismiss the petition.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. It will not effectuate the purposes of the Act to assert jurisdiction in this case.

IV. ORDER

IT IS ORDERED that the petition filed in this case is dismissed.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **March 7, 2008**. The request may be filed electronically through E-Gov on the Board's web site, www.nlrb.gov,⁵ but may not be filed by facsimile.

⁴ Because I have determined that the Employer is not subject to the jurisdiction of the Act, it is unnecessary to make a finding regarding the unit placement of the Employer's groomers.

⁵ To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then

Dated: February 22, 2008

/S/{Ronald K. Hooks}

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complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.